

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. NO.: 04-CV-12253MLW

STEVEN MCDERMOTT and)
STACEY MCDERMOTT,)
Plaintiffs)
)
v.)
)
FEDEX GROUND PACKAGE SYSTEMS, INC.,)
T.S. PRUITT, ALLEGIANCE HEALTHCARE)
INC., D. PONCE, E.W. WYLIE)
CORPORATION, D.W. SMITH,)
ARSENBERGER TRUCKING, INC.,)
J.T. FOSBRINK, RYDER TRUCK RENTAL,)
LORRAINE ODZANA as ADMINISTRATRIX)
OF THE ESTATE OF JAMES J. ODZANA,)
SHORELINE TRANSPORTATION, INC.,)
JACYLYN PALETTA as ADMINISTRATRIX)
OF THE ESTATE OF MARIO J. CASTRO,)
Defendants)

**DEFENDANTS, D.W. SMITH AND E.W. WYLIE'S, CONSOLIDATED LIMITED
OPPOSITION TO THE CO-DEFENDANTS' MOTIONS FOR SEPARATE AND
FINAL JUDGMENT PURSUANT TO FEDERAL RULE OF
CIVIL PROCEDURE 54 (b)**

NOW COME the defendants, D.W. Smith and E.W. Wylie ("Smith and Wylie"), in the above-captioned action, in limited opposition to the motions of the co-defendants for separate and final judgment. In further support of their limited opposition, Smith and Wylie state the following:

Ryder Truck Rental, Jaclyn Paletta as Administratrix of the Estate of Mario Castro, J.T. Fosbrink, Arsenberger Trucking, Inc. and Shoreline Transportation, Inc. (the co-defendants") have pursued separate and final judgment

pursuant to Fed. R. Civ P. 54(b). Smith and Wylie oppose the co-defendants' motions on the basis that Smith and Wylie reserve their right to file a contribution action against the dismissed co-defendants in Pennsylvania. Such an action would be permitted given that the co-defendant dismissals based on lack of personal jurisdiction are not an "adjudication upon the merits." See Fed. R. Civ. P. 41(a). Moreover, a dismissal based on lack of personal jurisdiction does not bar a subsequent action as it does not have a res judicata effect. See Integrated Technologies Ltd. v. Biochem Immunosystems, (U.S.) Inc., 2.Fed. Supp. 97, 105 (1998) citing Eason v. Linden Avionics, Inc., 706 F.Supp. 311, 317 (D.N.J.1989).

Therefore, the defendants, Smith and Wylie, oppose the co-defendants' motions for separate and final judgment pursuant to Fed. R. Civ. P. 54(b) on the basis that Smith and Wylie are not precluded from pursuing a contribution action against the dismissed co-defendants in Pennsylvania.

THE DEFENDANTS,
E.W. WYLIE CORPORATION AND
D.W. SMITH,
BY THEIR ATTORNEYS,

Date: 11/06/07


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